No. 09-17

In the Supreme Court of the United States

UNITED STATES AVIATION UNDERWRITERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' tort action against the United States, which alleged negligent failure to warn pilots of unforecast turbulence.

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In the Supreme Court of the United States

No. 09-47

UNITED STATES AVIATION UNDERWRITERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 562 F.3d 1297. The opinions of the district court (Pet. App. 7a-12a, 13a-29a) are reported at 567 F. Supp. 2d 1407 and 530 F. Supp. 2d 1315, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2009. A petition for rehearing was denied on April 16, 2009 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on July 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, provides a limited waiver of sovereign immunity for certain tort actions against the United States. The FTCA's waiver of immunity is subject to several express exceptions, see 28 U.S.C. 2680(a)-(n), including, as pertinent here, the "discretionary function" exception. 28 U.S.C. 2680(a). That exception provides that the FTCA shall not apply to:

> Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Ibid.

An action comes within the discretionary function exception if (1) it "involves an element of judgment or choice," and (2) the "judgment is of the kind that the discretionary function exception was designed to shield." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). The first step of the inquiry focuses on whether a "federal statute, regulation, or policy specifically prescribes a course of action" as to the decision at issue. *Ibid.* The second step of the inquiry focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991); see *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (exception prevents "judicial second-guessing" of decisions "grounded in social, economic, and political policy" (internal quotation marks omitted)).

2. On March 27, 2003, a small twin-engine aircraft crashed, killing the two pilots on board. Pet. App. 13a.

Petitioners, the owner of the plane and its insurer, contend that the crash was precipitated by the plane's encountering of unforecast "clear air turbulence" (CAT) of severe intensity. *Id.* at 13a-14a & nn.1 & 2; Pet. 4-5.

Petitioners filed suit against the United States to recover damages for losses they suffered as a result of the crash under the FTCA. Pet. App. 13a. Petitioners attribute the accident to the failure of the National Weather Service (NWS) to forecast severe CAT allegedly occurring during the flight, and to the failure of the Aviation Weather Center (AWC) to issue an advisory to pilots about that turbulence. Petitioners relied upon an NWS policy directive (NWS Instruction 10-811) stating that an advisory to pilots, known as a Significant Meteorological Advisory (SIGMET), "will be issued" when severe CAT and other weather hazards meeting specified criteria "occur or are expected to occur." *Id.* at 5a, 9a, 26a.

The United States moved to dismiss, arguing that petitioners' claim was barred by the discretionary function exception to the FTCA. The district court granted the motion with respect to petitioners' claim that the NWS negligently failed to forecast severe turbulence. The court explained that "[m]aking the weather forecast and determining whether a SIGMET * * * was happening or was going to happen is * * * conduct that the discretionary [function exception] protects." Pet. App. 28a. The district court denied the motion to dismiss as to petitioners' claim that the AWC breached its nondiscretionary duty to provide a warning to pilots once a "meteorologist determined that a SIGMET * * * warning was warranted." *Id.* at 29a.

The district court later granted summary judgment to the government on petitioners' remaining claim re-

garding the failure of the AWC to provide a warning to the pilots, based upon petitioners' concession that, in fact, the NWS had not forecast severe turbulence. Pet. App. 8a. The court reasoned that because the NWS never determined that severe turbulence was occurring or expected to occur, the nondiscretionary duty to issue a SIGMET and provide information to the pilot about the occurrence of such turbulence never arose. *Id.* at 12a.

3. The court of appeals affirmed. Pet. App. 1a-6a. The court explained that "[b]ecause the meteorologist must exercise his judgment when identifying weather patterns, forecasting 'involve[s] an element of judgment or choice,'" and thereby satisfies the first prong of the discretionary function analysis. *Id.* at 5a (alteration in original) (quoting *Gaubert*, 499 U.S. at 322). The court also agreed that "weather forecasts are the type of policy decisions that the discretionary function exception protects from liability under the FTCA." *Ibid.* Such forecasts and accompanying warnings, the court explained, implicate "cost and budgetary policy considerations * * * and the dangers of over warning." *Id.* at 5a-6a. The court noted that, if NWS meteorologists had determined that severe turbulence was occurring or was likely to occur, issuance of a SIGMET warning by the AWC would have been required under the pertinent NWS instruction. *Id.* at 5a. But the court concluded that the "underlying determination of whether severe CAT is occurring is discretionary." *Ibid.* Thus, because NWS meteorologists did not make such a determination, the AWC's nondiscretionary duty to issue a SIGMET warning never arose.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. The court of appeals correctly held, in accordance with well-established precedent, that the discretionary function exception bars petitioners' claims in their entirety. See *Monzon* v. *United States*, 253 F.3d 567, 572 (11th Cir. 2001) (failure of the NWS to issue a warning regarding riptides was protected by the discretionary function exception), cert. denied, 535 U.S. 1035 (2002); *Brown* v. *United States*, 790 F.2d 199, 203 (1st Cir. 1986) (weather forecasting "[w]ithout question" constitutes a discretionary function), cert. denied, 479 U.S. 1058 (1987); *National Mfg. Co.* v. *United States*, 210 F.2d 263, 278 (8th Cir.) ("The forecasting or omission of forecasts * * * is a 'discretionary function' excepted from the [FTCA] by Section 2680(a)."), cert. denied, 347 U.S. 967 (1954). As these decisions have recognized, claims premised upon the forecasting of weather implicate both parts of the discretionary function inquiry: they involve the exercise of discretion, and they are "susceptible to policy analysis," *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991).

a. Weather forecasting is fundamentally discretionary in character and "involve[s] an element of judgment or choice." Pet. App. 5a (alteration in original) (quoting *Gaubert*, 499 U.S. at 322). As the court of appeals explained, the record below demonstrates that forecasting and identifying weather patterns "requires subjective evaluation by the meteorologist," and "[t]he meteorologist must weigh a number of factors and a range of available data." *Ibid.*; see *id.* at 27a-28a (district court noting

that petitioners did not "isolate any rule or regulation that governs the development of weather forecasts or the determination of whether a meteorological event is taking place at any given moment," and concluding that "[a] forecaster must * * * exercise his or her judgment when identifying the weather pattern"); *Brown*, 790 F.2d at 204-205 (Pettine, J., concurring) (weather forecasting consists of a prediction determined by numerous and varied factors, none of which is necessarily determinative).

Petitioners argue that the discretionary function exception is inapplicable because the NWS's discretion regarding the forecasting and identification of weather patterns does not extend to the AWC's nondiscretionary duty to deliver a SIGMET warning to pilots "once the meteorologists determine that severe CAT is occurring or is likely to occur." Pet. 8 (quoting Pet. App. 5a). But that nondiscretionary duty was never triggered here, because NWS meteorologists never made the predicate determination that severe CAT was occurring. As the district court explained, "[b]ecause the Government never decided that significant CAT was occurring, the NWS Instruction never required a response." Pet. App. 12a. Thus, under the facts of this case, the AWC's duty to issue a SIGMET warning to pilots had no application.

Any suggestion by petitioners that the NWS had "knowledge that severe CAT was occurring or expected to occur" (Pet. 13), and that AWC was therefore required to issue a SIGMET warning to the pilots, is without foundation. They cite no evidence that the NWS had any such knowledge or made any such determination, and the district court explicitly rejected that theory. See Pet. App. 12a ("the Government never decided that significant CAT was occurring"); see also *id.* at 11a

("[D]etermining whether moderate to severe CAT 'is occurring' requires discretion.").

b. It is likewise well-established that weather forecasting implicates the type of policy judgment that the discretionary function exception shields from liability. See *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). As the court of appeals correctly determined, "[a] weather forecast is a classic example of a prediction of indeterminate reliability, and a place peculiarly open to debatable decisions, including the desirable degree of investment of government funds and other resources." Pet. App. 6a (quoting *Brown*, 790 F.2d at 204). Forecasting involves a number of policy-based considerations, including "(1) cost and budgetary policy considerations in the NWS' forecasting and warning services; (2) the general 'don't overwarn' policy in which the NWS strives for 'the highest rate of severe weather detection while maintaining the lowest possible false alarm rate in the issuance of warnings,' and (3) the policy of vesting discretion in the forecaster." *Monzon*, 263 F.3d at 572 (quoting *Bergquist* v. *United States Nat'l Weather Serv.*, 849 F. Supp. 1221, 1228-1229 (N.D. Ill. 1994)).

Thus, because the only relevant NWS conduct challenged here (the fact that the NWS did not find that CAT was occurring or was expected to occur) was both discretionary and policy-based, the court of appeals properly affirmed the dismissal of petitioners' FTCA claims under the discretionary function exception.

2. The decision below does not conflict with any decisions of this Court or of any courts of appeal.

Petitioners argue (Pet. 9-11) that the decision below is inconsistent with *Berkovitz*, 486 U.S. at 536, and *In re Glacier Bay*, 71 F.3d 1447, 1451 (9th Cir. 1995), because the court of appeals failed to analyze separately whether

the NWS's failure to *forecast* turbulence, as well as the AWC's failure to *warn* of turbulence, each constituted discretionary functions. See *Berkovitz*, 486 U.S. at 536 (courts should analyze whether the agency conduct at issue involves "a matter of choice for the acting employee"); *Glacier Bay*, 71 F.3d at 1451 ("Each separate action must be examined to determine whether the specific actor had discretion of a type Congress intended to shield."). But contrary to petitioners' assertions, the courts below did analyze separately whether petitioners' allegations based on the asserted failure to forecast and on the asserted failure to warn each involved discretionary conduct.

As to the asserted failure to forecast or identify turbulence, the court of appeals held that the NWS's "underlying determination of whether severe CAT is occurring is discretionary." Pet. App. 5a; see *id.* at 27a-28a. It held that forecasting "involve[s] an element of judgment or choice" and is "the type of policy decision[] that the discretionary function exception protects from liability under the FTCA." *Id.* at 5a (citation omitted).

As to the asserted failure to warn of turbulence by issuing a SIGMET warning, the court of appeals specifically considered and rejected the applicability of the NWS Instruction requiring the issuance of SIGMET warnings. Pet. App. 5a. The court recognized that the directive to the AWC to issue a SIGMET warning applies only if the NWS, in its discretion, forecasts severe turbulence or determines that it is occurring. *Ibid.* Because this predicate discretionary determination was not

made here, no mandatory duty was implicated.* See *ibid.*; see also *id.* at 11a-12a, 27a-28a (district court orders finding that a mandatory duty to issue a SIGMET warning did not arise because the NWS did not determine, in its discretion, that turbulence was occurring or expected to occur). The court of appeals therefore had no reason to analyze separately whether the AWC's function of issuing warnings was discretionary in nature. See *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944) ("[O]pinions are to be read in light of the facts of the case under discussion."). Nothing about this commonsense reasoning is inconsistent with *Berkovitz* or *Glacier Bay*.

3. Finally, there is no merit to petitioners' contention that the court of appeals' decision "expands the reach of the discretionary function exception." Pet. 12. Contrary to petitioners' assertion, the decision does not hold or suggest that every mandatory government activity becomes discretionary "if the government points to the exercise of discretion by some government employee somewhere in a chain of activities that leads up to a particular event." *Ibid.* Rather, the decision simply reflects the court's plainly correct understanding that a plaintiff cannot circumvent the discretionary function exception by invoking a mandatory government directive, unless that directive is applicable to the specific factual context presented.

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* Petitioners themselves recognize this point when they observe that "if no severe CAT is identified by government forecasters, then no SIGMET warning is issued." Pet. 11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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